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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 226

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CASIMIR E. MIDOWICZ,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.

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BRIEF FOR PETITIONER.

Opinion Below.

Reported in 136 Fed (2nd) 175.

Jurisdiction.

1. The Judgment of the Circuit Court of Appeals for the Seventh Circuit enforcing the order of the National Labor Relations Board was entered June 5th, 1943, upon petition of Polish National Alliance for review of the order, and cross petition of the Board for enforcement. The petition for Review was filed under Sec. 160(f) Title 29 U. S. Code (1940 Ed.). Decree of enforcement was entered on

June 22, 1943. Certiorari was granted on October 11th, 1943, on petition of Polish National Alliance.

2. Petitioner is a fraternal benefit society, organized as a not for profit corporation under the laws of the State of Illinois, with its head office in Chicago, Illinois.

3. Jurisdiction is invoked under Sec. 347 A, Title 28, U. S. Code (1940 Ed.).

STATEMENT OF THE CASE.

The Pleadings.

A complaint was issued March 9, 1942, by the National Labor Relations Board (amended March 12, 1942) (R. 41), against petitioner, Polish National Alliance of the United States of North America, charging that petitioner is a fraternal benefit society, incorporated under the laws of the State of Illinois, with its main office in Chicago; and stating that it was engaged in the operation of a death, disability and accident insurance business, the publication of a weekly and a daily newspaper and in the investment of funds in real estate and securities.

The complaint alleged that petitioner was licensed to conduct an insurance business in twenty-six states of the United States, in the District of Columbia and in Manitoba, Canada. That it writes insurance, collects premiums and pays out benefits in all the states and territories in which it is licensed. That it had investments throughout the United States in stocks, bonds and mortgages and real estate.

It stated that Office Employees' Union No. 20732 A.F. of L. is a labor organization within the meaning of Section 2 (5) of the Act.

The complaint set out what it alleged to be an appropriate bargaining unit, including several classes of office employees and excluding others; and stated that on or about March 26, 1941, a majority of such unit selected the Union as their representative for collective bargaining, but petitioner refused to bargain collectively with the Union, thereby violating Sec. 8(5) of the Act relating to unfair labor practices (R. 42).

It was charged that one Anna Owsiak had been discharged for Union activities. That a strike began October 7, 1941 and continued until January 7, 1942,—provoked and prolonged by petitioner. That one Henry Ziolkowski on or about October 10, 1941, who had gone out on strike, asked reinstatement and was refused it. That twenty-six strikers also asked reinstatement and were refused.

The acts charged were alleged to have a close relation to interstate commerce and to tend to cause labor disputes "burdening and obstructing commerce and the free flow of commerce."

The answer filed by petitioner (R. 46) admitted that it was a fraternal benefit society incorporated under the laws of the State of Illinois, with its main office in Chicago. Petitioner denied that it was engaged in the operation of a death, disability and accident insurance business and in the publication of a weekly and a daily newspaper. It admitted its investment of funds and that it is licensed to do business in twenty-six states, the District of Columbia and Manitoba, Canada.

Petitioner denied that it wrote insurance, collected premiums and paid out benefits other than as a fraternal benefit society organized under the laws of the State of Illinois. It denied that it conducted an "insurance business" or published a newspaper other than the weekly official organ of the society, to circulate among the members

whose subscription was included in their membership fee. It stated that the daily newspaper referred to, was published by a separate corporation whose capital stock was owned by the directors of petitioner *ex officio* (R. 48).

The answer denied that petitioner was engaged in interstate commerce within the National Labor Relations Act (R. 48). It stated that petitioner is a non profit organization with purposes set out in the Preamble to its Constitution, which were to form "a more perfect union of the Polish people in this country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs; and promoting more effectually all movements tending to secure by all legitimate means the restoration and preservation of the independence of the Polish territories in Europe." Its stated objects, in addition, were to "promote fraternalism among its members, and provide death, disability, accident and other benefits to its members and their beneficiaries."

The answer denied that an appropriate bargaining unit was set out in the complaint as amended and alleged that certain persons and classes sought to be excluded should be included in the unit (R. 48). It denied that the Union had a majority in an appropriate unit. It admitted its refusal to bargain, saying that it was not engaged in interstate commerce and therefore not within the Act.

The unfair labor practices were denied, also the discriminatory discharge of Anna Owsiak, the alleged coercion and interference, and the refusal to reinstate Henry Ziolkowski and the other strikers. It denied that its conduct led to labor disputes which burdened or obstructed commerce and the free flow of commerce (R. 49).

The Evidence.

The charter of petitioner (R. 140, 5) shows that it is an Illinois corporation, organized as a fraternal benefit society without capital stock, for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and a representative form of government. The Preamble to its Constitution states (R. 52):

> "When the Polish Nation, notwithstanding heroic sacrifices and sanguinary struggles, lost its independence, and by decree of Providence became doomed to triple bondage and was divested of its rights to life and development by force of the invaders, that portion thereof, most severely wronged, voluntarily, preferring exile to cruel bondage in the Motherland, sought refuge under the guidance of Kosciuszko and Pulaski, in the free land of Washington, and settling here, found Hospitality and Equal Rights.
>
> These valiant pilgrims, ever mindful of their duties to their newly adopted country and their own nation, founded the Polish National Alliance of the United States of North America for the purpose of forming a more perfect union of the Polish people in this country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs; and promoting more effectually all movements tending to secure, by all legitimate means, the restoration and preservation of the independence of the Polish territories in Europe."

Petitioner is organized into 1817 lodges, which meet at least once a month. Its supreme legislative and governing body is the Convention which meets at least once in four

years. Delegates to the Convention are selected from groups of lodges, each group forming what is known as a Council, of which there are approximately 190 (R. 13, 25, 26, 88, 91, 105).

The elective officers are the Censor, Vice-censor, and Commissioners, who together form the judicial, appellate and supervisory body in the Alliance known as the Supervisory Council. There are also elected a President, two Vice-Presidents, General Secretary, Treasurer and Board of Directors. The Board of Directors is the executive and managing body of the Alliance (R. 26, 37, 40, 71, 73, 74, 75, 76).

On December 31, 1941, petitioner had in force 272,897 benefit certificates of the value of $159,683,583. It owned assets of $30,090,835 in cash and bonds issued by the U.S. and by the several States and political subdivisions thereof, and by Canada and Poland; also stocks, mortgages and real estate in several States. Its income during 1941 was $5,717,344 of which $3,732,364 was received from members, and $1,690,250 from investments. In 1941 benefits paid amounted to $1,845,126, and sums spent in charitable, educational and patriotic activities in 1941 amounted to $252,210.03 (R. 105, 134).

The operations of the Alliance, beneficiary and fraternal, are centered in the Home Office in Chicago, Illinois.

The Directors of the Alliance are *ex officio* stockholders of Alliance Printers and Publishers Inc. an Illinois corporation with its principal office in Chicago, which publishes the weekly organ of the Alliance, the subscription to which is included in the membership dues; and a daily paper which is put on sale in Illinois, Indiana and Michigan (R. 47, 135).

Petitioner has spent $7,109,786.87 since its organization for charitable, educational and fraternal activities among its members (R. 167). Some of the principal items of this expenditure are: Educational $3,620,862.90; National purposes $2,388,959.52; Relief $698,042.94; Commissions and Departments $316,568.02 (Immigration Commission, Help to Immigrants, etc); Civil manifestations and memorials $83,353.49 (R. 168, 169, 170).

Office Employees Union No. 20732 is a labor organization affiliated with the American Federation of Labor. It admits to membership office employees of petitioner's Chicago office (R. 181).

Petitioner refused recognition to the Union, stating that it was not subject to the jurisdiction of the National Labor Relations Board (R. 21). A strike was called. In certain communications from the Head Office to the lodges and councils petitioner charged that certain of the strikers were seeking revenge on the present officers because of their defeat at the last Convention when the "leader of the dissatisfied employees was one of the candidates" for office of Secretary General. In one of the issues of the weekly organ of the Alliance it was stated over the signature of certain officers that the Directors could not permit persons who had nothing in common with the Polish National Alliance and Polish traditions to decide who was qualified for work in the offices of the Alliance; and that a labor union was not necessary in a fraternal benefit society, organized for the mutual benefit of all; and that, in any event, the question was one properly to be passed upon by the Convention as the "Supreme Governing body of our Society" (R. 127). The article declared that in the opinion of the signers the Alliance was not subject to the provisions of the National Labor Relations Act.

The Order and Decree of Enforcement.

The hearing before the Trial Examiner resulted in an intermediate report, recommending an order as prayed in the complaint as amended, which, upon exceptions and oral argument, was sustained in great part (R. 175, 182).

The Board held that "Although the respondent (petitioner here) has been organized as a non-profit corporation and its charter emphasizes the cultural and social purposes of its incorporation, these factors are not conclusive of the question of our jurisdiction; the determining point is what the corporation does. The activities of the respondent in issuing insurance benefit certificates and its attendant investments mark it as an insurance company. We have previously held that a company engaged in the insurance business, through similar extensive activities, is engaged in commerce within the meaning of the Act. Moreover, the fact that the respondent may not be organized for "profit" does not place it beyond our jurisdiction. We find that the respondent is engaged in commerce within the meaning of the Act" (R. 190).

The Board found that petitioner's activities "have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (R. 213).

There was an order requiring petitioner to cease and desist from refusing to bargain with the Union; and directing other action to be taken consonant with this requirement (R. 217).

A petition for review was immediately filed by the Polish National Alliance. The Board answered and also requested enforcement of the order. The Circuit Court of

Appeals on June 23, 1943 entered an order of enforcement which is stayed, pending certiorari (R. 221, 224, 225).

The Circuit Court of Appeals found petitioner to be engaged in the insurance business, and held that *Paul* v. *Virginia* and its successors were not decisive because "in each of them the Court was considering the power of the State to tax or regulate, and not the power of Congress under the Commmerce Clause" (R. 228-240).

Certiorari was granted on October 11, 1943, limited to the first five questions presented in the petition. These questions are:

1. Is an Illinois fraternal benefit society, operating in the several States from its head office in Chicago, Illinois engaged in commerce within the meaning of the commerce clause of the Constitution of the United States?

2. Is a fraternal benefit society incorporated under the Laws of the State of Illinois an insurance company, and its operations in issuing benefit certificates the business of insurance?

3. Is insurance "commerce" within the meaning of the commerce clause of the Constitution of the United States?

4. Does the use of the mails and other means of interstate communication and transportation incidentally to the issuance of benefit certificates and the investment activities of a fraternal benefit society bring the society within the provisions of the National Labor Relations Act as thereby "affecting commerce", so that a labor dispute with its employees may be considered as "burdening and obstructing commerce and the free flow of commerce"?

5. Does the incidental use of the mails and of interstate means of communication and transportation by any organization whose primary activity is not commerce within the

meaning of the Commerce Clause of the Constitution of the United States, bring such organization within the provisions of the National Labor Relations Act, as thereby "affecting commerce" and a labor dispute with its employees as "burdening and obstructing commerce and the free flow of commerce"?

In view of the limitation of the Court's consideration to these questions only, there has been omitted from the record the evidence as to the alleged unfair labor practices and the evidence upon the question as to whether or not the Labor Union had a majority of an appropriate bargaining unit; and there will be no discussion of these matters by the petitioner.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that petitioner, a not for profit fraternal benefit society organized under the laws of Illinois, is engaged in the business of insurance.

2. In holding that insurance is commerce within the meaning of the National Labor Relations Act.

3. In holding that the fraternal benefit operations of petitioner affected commerce within the meaning of the National Labor Relations Act, and that a labor dispute between petitioner and its employees burdened and obstructed commerce and the free flow of commerce.

4. In holding that use of the mails and of the means of interstate communication and transportation brought petitioner within the purview of the National Labor Relations Act, as having affected commerce by such use, whether petitioner has otherwise engaged in commerce or not.

5. In entering the enforcement decree herein, and each provision thereof.

6. In refusing to dismiss the complaint as amended.

Summary of Argument.

I.

Petitioner is a fraternal benefit society, organized under the laws of the State of Illinois as a not for profit corporation, having a representative form of government and a lodge system with ritualistic form of work. The issuance of benefit certificates to its members is not engaging in the insurance business, as found by the Court of Appeals. Petitioner is not in commerce, nor do its activities affect commerce, or a dispute with its employees burden commerce, or the free flow of commerce, so as to bring it within the National Labor Relations Act.

The holding of the Circuit Court of Appeals that a fraternal benefit society is engaged in the business of insurance is counter to the law in Illinois and other States. These societies in Illinois are organized and operate under a special Article of the Insurance Code, and are there declared to be charitable and benevolent institutions.

The aims of a fraternal benefit society are religious, cultural and fraternal. They are not permitted to make a profit on their benefit certificates, which are considered incidental to the main purposes of their creation. Without the profit motive there is no commerce in the Constitutional sense. This is recognized by this Court in the *Associated Press* case 301 U.S. 123, 5, where it is stated that although the Press Association was a non-profit organization its members were all "engaged in a commercial business for profit."

II.

Insurance is not commerce. The Court of Appeals in holding that petitioner was engaged in the insurance business, and was therefore engaged in commerce, or, in any event, its activities affected commerce, refused to follow the long line of decisions in this Court beginning with *Paul* v. *Virginia*, 8 Wall. 168, that insurance is not commerce. The cases hold that a policy of insurance is not a commodity and therefore is not the subject of interstate commerce.

III.

That which in its consummation is not commerce, does not become commerce between the States because incidental transportation or the use of the mails takes place in connection therewith.

The Court of Appeals, in holding, in effect, that mere use of the mails or other means of interstate communication incidentally to the issuance of fraternal benefit certificates, was alone and of itself sufficient to bring any organization, whether conducted for profit or not, within federal regulation, obliterates all distinction between what is commercial in the Constitutional sense and what is merely incidental to operations which in their consummation cannot be regarded as commercial. Such a rule brings religious, philanthropic, cultural and other organizations, using the mails and interstate communication, within federal regulation, and within the operation of the Act in question.

IV.

At the time of the enactment of the National Labor Relations Act insurance had long been held by this Court

not to be commerce within the meaning of the Commerce Clause. Congress did not challenge this construction and specifically include insurance companies within the coverage of the Act. Their regulation, therefore, remains with the States, and they are not within the Act in question.

This Court has held that insurance is not commerce, the making of the contract of insurance is not engaging in commerce, and the policy of insurance is not an instrumentality of commerce.

The "enactment by Congress of legislation which implicitly recognizes the judicial construction" of a Constitutional provision or a former Act of Congress, "is persuasive legislative recognition that the judicial construction is the correct one" (*Apex Hosiery* case, 310 U. S. 469, 487).

Conclusion.

The question is one of the constitutional power of Congress to regulate insurance, since insurance has been declared to be the making of a contract, and not a commodity.

The question is also one of statutory construction, whether Congress included insurance within the definition of commerce contained in the National Labor Relations Act.

Petitioner, moreover, is a charitable and benevolent institution not engaged in the pursuit of profit, but rather of fraternal, cultural and patriotic aims. It is not engaged in commerce within the meaning of the Commerce Clause or the National Labor Relations Act. The judgment and decree of the Court of Appeals should be reversed, the order of the Board set aside and the amended complaint dismissed.

PROPOSITIONS OF LAW.

I.

Petitioner is a fraternal benefit society, organized under the laws of the State of Illinois as a not for profit organization, having a representative form of government and a lodge system with ritualistic form of work. The issuance of benefit certificates to its members is not engaging in the "insurance business" as found by the Circuit Court of Appeals. Petitioner is not in commerce, nor do its activities affect commerce, or a dispute with its employees burden commerce, or the free flow of commerce so as to bring it within the National Labor Relations Act.

Article XVII Illinois Insurance Code Secs. 296, 314, (Ill. R. S. 1941 Ch. 73).

People v. *Commercial Insurance Co.*, 247 Ill. 92, 100.

Vol. 1 Couch Cyc. of Ins. Law (1929 Ed.) p. 609.

National Union v. *Marlow*, 74 Fed. 775, 776.

Peterson v. *Manhattan Life Ins. Co.*, 244 Ill. 329, 337.

Royal Arcanum v. *Behrend*, 247 U. S. 394.

Briggs v. *Bankers Acc. Ins. Co.*, 214 Ill. App. 181, 187.

Modern Woodmen v. *Mixer*, 267 U. S. 544, 551.

Northwestern Life Ins. Co. v. *Wisconsin*, 247 U. S. 132, 138.

II.

Insurance is not commerce.

Paul v. *Virginia*, 8 Wall. 168.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250.

Blumenstock v. *Curtis Publishing Co.*, 252 U. S. 436, 442.

N. Y. Life Ins. Co. v. *Cravens*, 178 U. S. 389, 401.

Liverpool Ins. Co. v. *Massachusetts*, 10 Wall 566, 573.

Noble v. *Mitchell*, 164 U. S. 367.

Philadelphia Fire Ins. Assn. v. *New York*, 119 U. S. 110, 118.

Nutting v. *Massachusetts*, 183 U. S. 553.

III.

The use of the mails and other means of interstate communication and transportation by petitioner in its operations as a fraternal benefit society is not engaging in interstate commerce. That which in its consummation is not commerce, does not become commerce among the States because incidental transportation takes place.

Hooper v. *California*, 155 U. S. 648, 655.

N. Y. Life Ins. Co. v. *Deer Lodge County*, 231 U. S. 495, 509.

Cooley on Constitutional Law (4th Ed. 1931) pp. 83, 84.

IV.

At the time of the enactment of the National Labor Relations Act insurance had repeatedly been held by this Court not to be commerce within the meaning of the Commerce Clause. Congress did not challenge this construction by specifically including insurance companies within the coverage of the Act. The regulation of insurance companies, therefore, remains with the States, and they are not within the Act in question.

Apex Hosiery Co. v. *Leader*, 310 U. S. 469, 487.
Popovici v. *Agler*, 280 U. S. 379, 383.
Final Report T. N. E. C. p. 41 (Doc. 35, 77th Cong. 1st Sess.).
Congressional Record 74th Cong. 1st Sess. Vol. 79 Part 9 pp. 9684, 9699.

ARGUMENT.

I.

Petitioner is a fraternal benefit society. It is not engaged in commerce, nor, by issuing benefit certificates to its members is it engaged in the business of insurance. It is a not for profit corporation, declared by the law of Illinois which created it, to be a charitable and benevolent institution.

The principal purposes of the Polish National Alliance, as declared by its Constitution, are to "form a more perfect union of the Polish people in this Country; insuring to them a proper moral, intellectual, economic and social development; preserving the mother tongue as well as the national culture and customs and promoting more effectually all movements tending to secure by all legitimate means the restoration and preservation of the independence of the Polish territories in Europe" (R. 52).

Since its organization up until the year 1941 petitioner spent $7,109,786.87 for charitable, educational and fraternal activities (R. 167) and during the same period paid out in benefits $38,076,756.73. In 1941 petitioner paid in benefits $1,845,126 (R. 105) and disbursed in charity and for education, Polish national causes and American Red Cross $252,210.03. Petitioner's (Respondent below) Exhibit No. 6 (R. 167) shows that the principal items of expenditure were upon Polish relief, the Alliance College and Educational Department, and the Youth Department of the Alliance which is concerned with providing recreation, physical education and culture for the young. Large sums were also spent in the relief of Polish people in Poland and in the United States.

The Illinois Insurance Code sets apart an entire Article for the regulation of fraternal beneficiary societies (Ill. Rev. Stat. 1941, Chap. 73, Article XVII). Section 314 of this Article declares:

> "Every fraternal benefit society organized, licensed or operating under this Code is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment."

It is under the provisions of this Article that petitioner, which was organized under the laws of Illinois as a not for profit corporation without capital stock, is operating. It is carried on for the sole benefit of its members and their beneficiaries under benefit certificates issued by petitioner. It has a lodge system with ritualistic form of work and a representative form of government. There are 1817 lodges in the Alliance, which meet once a month. Its supreme legislative and governing body is an elective body called the Convention, which meets once each four years (R. 105).

In *Vol. 1 Couch Cyc. of Insurance Law* (1929 Ed.) page 609, it is said:

> "The statutory distinction is that insurance companies are organized for ordinary business purposes, for investment and for the benefit of credit, as well as for the protection of the family, whereas fraternal Orders and benefit societies are not organized for the purpose of profit. Certificates in mutual benefit societies do not constitute insurance within the meaning of provisions against other, over or double insurance."

In *Northwestern Life Ins. Co.* v. *Wisconsin*, 247 U.S. 132, 138, the Court say: "We think the differences (be-

tween an insurance company and a fraternal benefit society) are plain. The fraternal and beneficial features are wanting in organizations like that of Northwestern Company."

In *Royal Arcanum* v. *Behrend*, 247 U.S. 394, the Court say on page 399:

> "The difference between ordinary life insurance and that furnished by the fraternal benefit societies has been universally recognized in legislation and is a matter of common knowledge."

In *Modern Woodmen* v. *Mixer*, 267 U.S. 544, 551, Mr. Justice Holmes, speaking for the Court, said:

> "The indivisible unity between members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."

In *National Union* v. *Marlow*, 74 Fed. 775, 778, 779, the Court, speaking of fraternal beneficiary associations, say:

> "The term 'fraternal' can properly be applied to such an association for the reason that the pursuit of a common object, calling or profession usually has a tendency to create a brotherly feeling among those who are thus engaged. It (the Legislature) has declared in effect, or intended so to declare, that when a certain number of persons, among whom some natural bond of sympathy or interest existed, should form

an association for self improvement or for the purpose of aiding one another and strengthening the bond of union, such association might be consolidated into a corporation, and incidentally, to further the ends of its creation, might provide for the relief of members and their families in case of sickness or death by levying assessments and issuing benefit certificates.

"We find nothing in the various sections of the Missouri statute . . . which justifies the conclusion that the lawmaker intended to create a class of corporations, termed 'fraternal-beneficial' for the sole and only purpose of doing an insurance business, provided that such corporations transacted business in a certain way, that is, through the agency of local councils or lodges. The statute shows, as we think, very plainly that a fraternal-benefit society can only become a body politic and corporate by satisfying the court to whom its petition for incorporation is addressed that it is engaged in some work, or purposes to become engaged, which is distinctly of a fraternal and beneficial nature. When this point is established to the satisfaction of the court by an inspection of its articles of association and the society becomes duly incorporated, the statute then confers upon it the right to make provision for the relief of its sick and disabled members and their families. This right, however, is merely incidental to the main purpose of its creation."

The Illinois Code provides (Art. XVII, Sec. 296) that "lawful social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society, and the mode in which its corporate powers are to be exercised."

The Code, which requires that the dues be sufficient to maintain the society in a financially sound position, and which makes provision for the usual State supervision of its investments and expenditures, gives the society the right to issue various forms of certificates,—term, life, endowment and annuity. The Code provides that the contract between the society and its members shall be the benefit certificate, which shall include in its terms the Constitution and bylaws of the organization. The society is permitted to expend a portion of its funds through patriotic, relief, or other similar channels (Sec. 293, Art. XVII). Petitioner in the year 1941 paid out benefits in the sum of $1,845,126.33 (R. 105), and disbursed for relief, education, Polish national purposes, American Red Cross, and the like, the sum of $252,210.03 (R. 170).

That the nature and effect of the benefit certificate is similar to that of the insurance policy does not make of the fraternal benefit society an insurance company, as held by the court below. Though the Polish National Alliance has grown during the more than half century of its existence into "the largest fraternal organization in the world of Americans of Polish descent" yet, like all other fraternal benefit societies it will always be limited to those who possess the qualifications for membership set out in its Constitution and bylaws, which in the case of the petitioner is confined to persons of a certain national descent who are willing to unite with others of like qualifications in the pursuit of the aims of the Alliance. This union and the pursuit of these aims are the primary purposes of the Alliance and the reasons for its existence.

These aims are not commercial. The seeking after profit is not even incidental to these aims. The Alliance is forbidden by its charter and the laws which give it

existence to engage in commercial operations in which the element of profit is present. The issuance of benefit certificates is but incidental to the main objects of its existence, permitted by the laws of Illinois as an encouragement of thrift and a means of protection of the widows and orphans of the members of the society, and of the members themselves who become aged or disabled.

Petitioner, therefore, is not engaged in commerce or in the business of insurance.

II.

Insurance is not commerce.

This court in an unbroken line of decisions has held that insurance is not commerce, and the insurance policy or contract of insurance is not an article of commerce. These decisions the Circuit Court of Appeals refused to follow.

In *Paul* v. *Virginia*, 8 Wall. 168, the Court declared:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts. . . . These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. . . . Such contracts are not interstate transactions, though the parties may be domiciled in different states."

The reasoning of *Paul* v. *Virginia* was thenceforward subject to constant attack, principally by insurance companies which sought to be relieved from the burdens of State taxation and regulation upon the ground that these

were burdens upon interstate commerce. This was markedly the case in *New York Life Insurance Company* v. *Deer Lodge County*, 231 U.S. 495, involving a State tax on insurance corporations. The complaint of the Company is summarized by the Court on page 499, wherein the Company had called attention to its huge size, and the international ramifications of its business, "in all of the States of the United States and with persons residing in every country of the civilized world," and declared that it had insurance in force in Montana alone, of over ten million dollars, calling for annual premiums in excess of three hundred and forty thousand dollars. "This total insurance" it said, "is made up of policies averaging two thousand dollars each, and these are subject to sale, assignment and transfer and are used for collateral security and other commercial purposes and are valuable for such purpose and for other general purposes of trade and commerce." Such transactions, it was alleged by the Company, were interstate commerce within the meaning of the Commerce Clause.

The Court ruled otherwise: first, upon the ground that *Paul* v. *Virginia* had been consistently followed and its doctrine had become established law. The Court say (p. 502):

> "If we consider these cases numerically (*Paul* v. *Virginia* and its successors), the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of State legislation, and under varying circumstances the same principle was applied to all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require

us to formulate a new rule of constitutional inhibition upon the States and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."

The Court then proceeds to analyse the cases at considerable length, and declares (p. 507):

"It was also urged that modern life insurance had taken on essentially a national and international character, and that when *Paul* v. *Virginia* was decided, the business was to a great extent local, that is, conducted through the domestic stock companies. The great and commanding organizations of the present day had hardly begun the amazaing development which has made them the greatest associations of administrative trusts in the business world. . . .

"These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in *Paul* v. *Virginia* and other cases applied. . . . We . . . repeated that the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. . . . The decision of the cases is that the contracts of insurance are not commerce at all, neither state nor interstate" (p. 509).

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, involving a state tax upon advertising, the Court say:

"That the mere formation of a contract between persons in different States is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question" (citing *Paul* v. *Virginia* and other cases).

In *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436, 442, it is declared:

> "The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.
>
> (This case is) within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts are a mere incident of commercial intercourse."

In *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, the Court say:

> "Is the statute (of Missouri, governing insurance policy provisions) an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States.
>
> That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia* (and other cases). That the business of marine insurance is not is decided in *Hooper* v. *California*. In the latter case it is said that the contention that it is, 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat: 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the "perils of the sea." And, we add, or against the uncertainty of man's mortality."

III.

The use of the mails and other means of interstate communication and transportation by petitioner as a fraternal beneficiary society operating in the several states; and its investment of funds in real and personal property situated in different states, do not, of themselves, bring petitioner within the purview of the National Labor Relations Act, as being engaged in commerce, or in activities which affect the flow of commerce.

"That which in its consummation is not commerce, does not become commerce among the States because incidental transportation takes place," is said by Cooley in his work on Constitutional Law (4th Ed. 1931) on page 84.

The same doctrine was announced by this Court in *N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 509, in these words:

> "There is necessarily a great and frequent use of the mails (by the insurance company), and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this, and the transmission of premiums, and the amounts of the policies constitute a 'current of commerce among the States.' This use of the mails is necessary, it may be to the centralization of the control and supervision of the details of the business; it is not essential to its character. . . .
>
> The number of transactions do not give the business any other character than magnitude. Nor, again, does the use of the mails determine anything. That (agents and applicants for insurance) may live in different States and hence use the mails for their communication does not give character to what they do; and cannot

make a personal contract the transportation of commodities from one State to another."

In *Hooper* v. *California*, 155 U. S. 648, the State had required foreign insurance companies to give bond before being allowed to do business within the state. This requirement was attacked as a burden upon interstate commerce. The Court, after citing *Paul* v. *Virginia*, declared that the State's authority to regulate foreign insurance companies, doing business within its borders rests upon the "difference between interstate commerce or an instrumentality thereof on the one side, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction," says the Court, "has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature."

The use of the mails and other means of interstate communication is common to most individuals and to organizations of every type,—commercial, philanthropic, religious, political or other. To make such use a test of the applicability of the Commerce Clause to, and consequent Congressional regulation of such individual or organization, is to make the Commerce Clause of universal application to the diverse affairs of practically all of the citizens of the different States.

To say that the use of the mails and other means of interstate communication and transportation is, of itself, to engage in commerce and to declare that a lessened use

of such facilities, caused by a strike of employes of the individual or organization in question, is to "affect commerce" within the meaning of the National Labor Relations Act, is to obliterate all distinction between those who are admittedly engaged in interstate commerce in the generally accepted sense, as being in trade or business for a profit and using interstate facilities of communication in the furtherance of their business; and those who, like petitioner, use such facilities in the prosecution of their social, cultural and patriotic aims, and in their consequent permitted activities in the issuance of benefit certificates to their members as a charitable and benevolent institution, without profit accruing therefrom.

Church organizations and other religious and cultural bodies, political organizations and similar bodies whose activities are nation-wide would be subject to federal regulation under the Act in question and other Acts based upon the powers contained in the Commerce Clause, if mere use of interstate communication is to be declared the engaging in or affecting of commerce.

Such a result was not intended by Congress. Nor would legislation of such boundless scope be within the Constitutional powers of Congress to enact, for thereby all distinction is abolished between what may properly be the subject of federal control and what is reserved to the States for regulation.

In *Labor Board v. Jones and Laughlin*, 301 U. S. 1, 30, this Court declared:

> "The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction which the Commerce Clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of

commerce is vital to the maintenance of our federal system."

To say that a strike in petitioner's home office would affect the volume of mail that petitioner habitually deposits in the postoffice, and obstruct its placing of investments throughout the United States; and hinder the flow of dues from members, is merely to declare the obvious result that would occur in any organization of any kind—religious, charitable, or other,—if a refusal to work by its employees became sufficiently widespread. Yet, it does not follow from such a result, alone, that the organization in question may be declared to be engaged in interstate commerce, and its activities, or, a cessation thereof, so affect commerce as to bring its relations with its employees under the control of the National Labor Relations Act.

In *Schechter Corp.* v. *United States,* 295 U. S. 495, on page 546, the Court say:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' intrastate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. . . . Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."

If the issuance of benefit certificates is engaging in the business of insurance, and insurance is not commerce, then petitioner is not engaged in commerce, and the effect upon commerce of its use of the mails is only an indirect result of its engaging in a purely intrastate transaction. But petitioner is not engaged in the business of insurance and its use of the mails and other means of communication is occasioned by its various activities as a fraternal benefit society, and related in no way to commerce except as the instrumentalities of communciation are used.

To make the use of such interstate channels of communication a decisive test of the nature of the activities engaged in by an individual or organization, as thereby being commercial, is to lay down an automatic rule of decision which requires no regard to be paid to the essential nature of the organization's or the individual's activities, as to whether they are in fact interstate commerce or not.

As was said above: "The number of transactions do not give the business any other character than magnitude. Nor, again does the use of the mails determine anything." (*N. Y. Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 509.)

Petitioner is a charitable and benevolent institution, so created and so declared to be by the law of the State which gave it a charter. It is organized upon a representative basis, and its supreme governing body is an elective one. Its officers and directors are elected by the membership in Convention assembled in the person of their elected delegates. Its members are bound together by the ritual and by the common purposes of the Alliance declared in the Constitution. They meet in numerous lodges for social intercourse and to combine in the pursuit by all lawful means of the declared aims of the Alliance, a principal one of which is the liberation of Poland from the invader.

The true nature of petitioner is to be found in these activities. It is not to be found in the fact that, incidental to these aims and activities, petitioner is permitted to, and does issue benefit certificates to its members for the protection of themselves and their families.

Profit, the essential element of Commerce, is absent from all the purposes and activities of petitioner. Without profit as an aim there is no trade or commerce within the meaning of the Constitution, other than the instrumentalities of commerce themselves. The instrumentalities of commerce, —the mails, interstate means of communication and transportation,—are undoubtedly within the Commerce Clause, but the mere use of them, incidental to the pursuit of the benevolent and charitable and patriotic aims and activities of petitioner does not bring petitioner, or any other like organization, within the meaning of the National Labor Relations Act as being engaged in commerce or affecting commerce, as the term "commerce" is commonly understood, and was so understood at the time of the passage of the Act.

The case of *Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 125, is not authority to the contrary. Although the Associated Press is a nonprofit organization it is one of the means through which profit is sought by its members. As the Court say on page 125: "It has about 1350 members in the United States, and practically all the newspapers represented in its membership are conducted for profit."

Petitioner is prohibited by the State of its creation from seeking or making a profit, and is, therefore not engaged in commerce.

IV.

Commerce, as defined by the National Labor Relations Act does not include insurance. At the time of its enactment, insurance had long been declared by this Court not to be commerce. Congress did not challenge this construction of the Commerce Clause. Insurance, therefore, is not within the purview of the Act.

An examination of the debates upon the bill which was enacted as the National Labor Relations Act, particularly the debate in the House, discloses that the members of the House had the question of the constitutionality of the proposed legislation constantly before them, with reference to its scope. It was contended by the opponents of the bill that the Act would be declared unconstitutional by this Court, or at least, very closely restricted in its operation to those businesses obviously engaged in interstate commerce, and would not be extended to concerns engaged in manufacturing, mining and the like.

That the subsequent decisions of this Court proved the opponents of the bill to have been mistaken may be due as much to misinterpretation by those members of the effect as law and precedent of the cases on which they relied in debate, as to any overruling of them by this Court, except, perhaps, in one instance. Such is not the case as to insurance. An unbroken line of authority, which stands to this day, had declared the doctrine that insurance is not commerce, which fact must be assumed to have been known by the Congress. When, then, Congress defined commerce in the Act it did not include insurance within that term.

In connection with the question of the scope of the bill, this occurred in the debate between Representatives Cox

and Marcantonio (Cong. Record, 74th Cong., 1st Sess., Vol. 79, Part 9, page 9699):

> "*Mr. Cox*: Is not the main purpose of this Bill to extend Federal control through the use of the commerce power of the Constitution by legislative definition and otherwise, to the point of taking out of State control that which has heretofore been regarded as a purely domestic activity?
>
> *Mr. Marcantonio*: Not necessarily; that is not the situation at all. We are trying to use whatever power Congress has under the Commerce Clause. The language of the bill is constitutional. Only when its application would be contrary to the definition of 'interstate' in the *Schecter* case would it be declared unconstitutional. Each case would stand on its own state of facts."

Representative Connery, whose name was on the bill, also declared (p. 9684):

> "The Wagner-Connery bill is built upon those decisions of the Supreme Court which say that a labor dispute, a strike which interferes with the free flow of commerce, is subject to regulation by the Congress of the United States under its interstate commerce powers. So we do not have any worries or fears about the constitutionality of this bill."

With the debate being given this form, both by the foes and the supporters of the bill, it is obvious that if the question had been raised as to whether or not insurance was included in the definition of commerce contained in the bill, the answer would have been in the negative. It was clearly the purpose of the supporters of the proposed legislation to write a bill that would conform to the definitions of Commerce theretofore announced by this Court.

In *Apex Hosiery* v. *Leader*, 310 U.S. 495, the Court say that:

> "The unanimity with which foes and supporters of the bill spoke of its aims as the protection of free competition, permit use of the debates in interpreting the purpose of the Act."

This Court also said in the *Apex* case, on page 487:

> "Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction, not constitutional power. The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."

In the definition of commerce which finally was embodied in the National Labor Relations Act there was no challenge to the decisions of this Court that insurance is not commerce, and no attempt was made, therefore, to include insurance within the scope of the Act.

In *Popovici* v. *Agler*, 280 U. S. 379, 383, which arose upon an application by a vice-consul for a writ of prohibition to restrain a divorce proceeding in a State Court, the petitioner relied on Article 3, Section 2 of the Constitution, which provides among other things, that jurisdiction of:

> "Suits and proceedings against Ambassadors or other public ministers or their domestics, or domestic servants, or against consuls or vice-consuls,"

shall be in the United States Court, exclusive of the Courts

of the several states. This Court, speaking through Mr. Justice Holmes, said (p. 383):

"The language so far as it affects the present case is pretty sweeping, but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,' and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied."

"The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. The statutes . . . do not affect the present case if it be true, as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife, parent and child, were matters reserved to the States, there is no difficulty in construing the instrument accordingly, and not much in dealing with the statutes. Suits against consuls and vice-consuls, must be taken to refer to ordinary civil proceedings and not to include what formerly have belonged to the ecclesiastical Courts."

CONCLUSION.

The question of whether insurance is or is not commerce has been up until now a question of constitutional power. The Court has declared that insurance is without the scope of the commerce clause as not being a commodity, but the making of a contract. The logic of *Paul* v. *Virginia* and of *New York Life Ins.* v. *Deer Lodge*

County is still good, and insurance will only be brought within the operation of federal regulatory legislation, if at all, by the incidents surrounding the making of the contract of insurance—the use of the mails and the investment of funds in different states, which are also incidental to the operations of non-commercial organizations such as religious and charitable and political bodies which operate throughout the nation.

It is said that state and federal regulation may exist concurrently—that there may be state taxation and federal control of labor relations. That is not the question before the Court. The question here is whether, in view of the declared law that insurance is not commerce, there can be federal regulation of any part of insurance operations.

The question is also one of statutory construction: whether in view of the long established doctrine, Congress can be held to have included insurance companies within the purview of the National Labor Relations Act as being engaged in commerce within the definition contained in the Act.

There is the further question whether petitioner as a fraternal benefit society, declared by law to be a charitable and benevolent institution and released as such from the ordinary incidence of taxation upon corporations in the State of its creation, is engaged in commerce. It seeks no profit from the issuance of benefit certificates to its members, and can make none. Its purposes and aims are fraternal, cultural and patriotic, and these it follows. This is not the commerce that is referred to in the Constitution, nor is it the commerce that is defined by the Act in question.

It is respectfully submitted that the judgment and decree of enforcement of the Circuit Court of Appeals for the Seventh Circuit should be reversed, and the order of the National Labor Relations Board be set aside, and the amended complaint filed herein be dismissed.

Respectfully submitted,

CASIMIR E. MIDOWICZ,
Attorney for Petitioner,
Polish National Alliance of
the United States of North America.

Of Counsel:
EWART HARRIS.